Cornell Law Library
Scholarship@Cornell Law: A Digital Repository

Cornell Law School Inter-University Graduate Student Conference Papers

Conferences, Lectures, and Workshops

4-14-2009

A Legal Appraisal of the West African Free Trade Area

Adedokun O. Ogunfolu
Cornell Law School, aoo26@cornell.edu

Follow this and additional works at: http://scholarship.law.cornell.edu/lps_clacp

Part of the Antitrust and Trade Regulation Commons

Recommended Citation
Ogunfolu, Adedokun O., "A Legal Appraisal of the West African Free Trade Area" (2009). *Cornell Law School Inter-University Graduate Student Conference Papers*. Paper 19.
http://scholarship.law.cornell.edu/lps_clacp/19

This Article is brought to you for free and open access by the Conferences, Lectures, and Workshops at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law School Inter-University Graduate Student Conference Papers by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Adedokun Olatokunbo Ogunfolu

A Legal Appraisal of the West African Free Trade Area

Introduction

African countries after independence in the latter half of the twentieth century embraced the formation of Free Trade Areas (FTAs), provided for under Article XXIV of the General Agreement on Trade and Tariffs (GATT 1947), as an exception to Article I Most Favored Nation (MFN) clause. FTAs were the adopted anodyne to reverse systemic underdevelopment wrought by departing colonialists from Europe and the emergence of the European Union. [1] Sub-Saharan Africa encompasses West Africa, and accounted for 1.1 per cent of world trade in 1991.[2] West African share of world exports with the exception of Nigeria fell from 1.6% in 1980 to 0.6 per cent in 2006.[3] In 1963 Africa's share of world exports was 5.7 per cent and imports accounted for 5.2 per cent, while in 2006 Africa's share of exports had declined to 3.1 per cent and imports 2.4 per cent. [4]

The Economic Community of West African States (ECOWAS)[5] FTA is relatively unknown in the United States, unlike the North American Free Trade Area (NAFTA), which came into effect on January 1, 1994.[6] ECOWAS is a model FTA on the successful abolition of

---

[1] Jon H. Sylvester, Sub-Saharan Africa: Economic Stagnation, Political Disintegration, and the Specter of Recolonization, 27 Loy. L.A.L. Rev. 1299 at 1321, (1993-1994).
[2] Id. at 1321.
[3] Africa and World Trade: Sub-Saharan Africa's falling share of world trade, European Centre for International Political Economy, (ECIPE) Media Briefing Note 1/2007, http://www.ecipe.org/press/Briefing%20note%20-%20Africa%20and%20world%20trade.pdf (Last visited Feb. 22, 2009)
[4] Id. 2.
[5] Kofi Oteng Kufour, Public Choice Theory and the Failure of the ECOWAS Trade Liberalization Scheme,23(4) World Competition, 137-154(2000).
[6] Claude E. Barfield, Regionalism and US Trade Policy, in The Economics of Preferential Trade Agreements 136-159(Jagdish Bhagwati and Arvind Panagariya eds., 1996).

visas amongst its members.[7] A brief history of western dominated international trade regime is necessary, in order to understand why West African countries' attempts to form a customs union resulted into a free trade area.

This paper analyzes the debate whether FTAs create trade or distort trade, and examines the arguments around their role in facilitating the growth pace of developing countries. The impact of the World Trade Organization (WTO) on developing countries is analyzed through the prism of the constructive school of international relations, and the normative constructs of the realist school. The paper appraises the international economic law regime, through the establishment of ECOWAS in 1975 by fifteen contiguous states in West Africa, to promote inter-regional trade and remove all barriers to labor, capital and ultimately establish a single currency for its fifteen countries. A critical legal analysis is carried out on the implementation of the goals of ECOWAS, and the modification of its treaty through additional protocols; to guarantee, peace, security and democracy in West Africa as a sine qua non for engaging the global economic community in a symbiotic relationship.

The paper concludes that ECOWAS has achieved peace and democracy in West Africa, despite limited resources, but its percentage share of world trade fell from 1.6 per cent in 1980 to 0.6 per cent in 2006, excluding oil exporting members. The paper observes that ECOWAS has a lot of homework to do in lowering rules of origin requirements for goods manufactured in its member countries, provision of public infrastructure, enabling access to credit by entrepreneurs, in order to promote regional trade and access to the global economy.

[7] Jean-Christophe Maur, Regionalism and Trade Facilitation: A Primer, 42, no.6 Journal of World Trade 979,993(2008).

I. Historical Background of FTAs

The lessons learnt by the United States from the most protectionist law in American trade history, the Smoot-Hawley Tariff Act of 1930, led to the Reciprocal Trade Agreements Act (RTAA) of 1934 crafted by Cordell Hull's attempt to promote free trade.[8] It was imperative that American "beggar-my-neighbor"[9] trade policies had to be reversed. This was the driving philosophy of the International Trade Organization (ITO) promoted by the United States to prevent another world war like the Second World War which the Smoot-Hawley Tariff Act had inadvertently caused.[10] The United States attempted to globalize the RTAA under a multilateral system like the Breton Woods institutions of the World Bank and the International Monetary Fund, created out of a compromise between the American Dollar and British Pound supported by gold reserves.[11]

In negotiations over the ITO, Britain and the United States failed to reach a compromise over trade preferences established by Britain throughout the Commonwealth.[12]

> One of the prime post World War II objectives of the United States was the dismantling of trade preferences especially the Commonwealth system…The United States' preoccupation with Commonwealth preferences was so intense that an administrative spokesman told Congress in 1947 that eliminating these preferences was almost a sine qua non of success at the Geneva Conference. Failure to achieve this result has been blamed as one of the causes for the failure of the United States to accept the Havana Charter, thus causing the ITO to fail to materialize [13]

What emerged from the ITO was the accidental birth[14] of a side agreement, the General Agreement on Tariffs and Trade (GATT). "The Geneva negotiations of 1947 set the precedent

---

[8] John H. Jackson, World Trade and the Law of GATT 251 (1969).
[9] Id. at 9.
[10] Joan E. Spero and Jeffrey A. Hart, The Politics of International Economic Relations, 50-51 (1997).
[11] Id. at 51.
[12] Id. at 51.
[13] See Jackson, supra note 8, at 251.
[14] Andreas F. Lowenfeld, International Economic Law 25 (2008).

for subsequent 'Rounds'-eight in all throughout the life of the GATT as an organization- that played a major part in the development of international trade law in the second half of the twentieth century."[15]Brazil, Burma, Ceylon, Chile, Cuba, India, Lebanon, Pakistan, Southern Rhodesia and Syria were foundation members of GATT from the developing world. Southern Rhodesia was still a colony which attained independence in 1980 as Zimbabwe.

Customs unions (CUs)[16] and free trade areas (FTAs)[17] are exceptions to the Most Favored Nation (MFN)[18] concept of the WTO GATT Article I. A CU is difficult to attain; hence the European Union[19] stands out as one of the rare examples of a successful CU.[20] A CU requires all its members to adopt the same tariff against countries outside their union, while FTA members retain external tariffs against third countries and both CU and FTAs must eliminate duties and other restrictive regulations of commerce on substantially all the trade amongst its members. Substantially all the trade has not been defined by either a Panel or Appellate Body of the WTO.[21] The Panel in the Turkey-Textiles case had assumed Turkey was in a customs union with the European Community and the Appellate Body held that the issue of whether Turkey met the requirements of paragraphs 8(a) and 5(a) of Article XXIV of GATT 1994 was not before it.[22]

---

[15] Id. at 27.

[16] See the seminal work of Jacob Viner, The Customs Union Issue 41-108 (1950).

[17] Anne O. Kruger Free Trade Agreements as Protectionist Devices: Rules of Origin, in The WTO and Reciprocal Preferential Trading Agreements 511 (Caroline Freund ed., 2007).

[18] Jacob Viner, The Most Favored Clause in American Commercial Treaties, 32 The Journal of Political Economy101-129 (Feb. 1924).

[19] The European Union was primarily created to put a stop to bloody wars between neighbours which climaxed in World War II, http://europa.eu/abc/history/index_en.htm (last visited Feb. 3, 2009); Gerhard Loibl, International Economic Law, in International Law, 689, 714-715 (Malcolm D. Evans ed., 2006).

[20] The oldest customs union is the South African Customs Union (SACU) established in 1910 and presently comprises of Botswana, Lesotho, Namibia, South Africa and Swaziland, http://www.sacu.int/ (last visited Feb. 3, 2009).

[21] Editorial Board, The WTO Doha Round and Regionalism, 35, no.4 Legal Issues of Economic Integration, 297,298 (2008).

[22] TURKEY-RESTRICTIONS ON IMPORTS OF TEXTILES AND CLOTHING PRODUCTS WT/DS34/AB/R, October 22,1999, Paragraph 60 Appellate Body, see full text at:
http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28%40meta%5FSymbol+WT%FCDS34%FCAB%FCR%2A+

"The 2007 dispute panel of Brazil-Retreaded Tyres came as close as yet seen to tackling this issue head-on."[23] The Panel had ruled that a Brazilian export ban on retreaded tyres was inconsistent with GATT Article XX:I and unjustifiable under Article XX(b) decided to exercise judicial economy in respect of the European Communities' separate claims which included non compliance with the requirements of Article XXIV of GATT 1994.[24]The Appellate body also decided to exercise judicial economy on making a pronouncement on the substantially all the trade requirements of Article XXIV,[25] and upheld the Panel findings on Article XX, but for the different reason that Brazil contravened the Chapeau of Article XX.[26]

The debate revolves around whether FTAS are building blocks or stumbling blocks within the multilateral trade regime of the WTO, or termites in the trading system.[27] Professor Bhagwati has asserted that "FTAs are two faced: they free trade among members, but they increase protection against nonmembers".[28]An FTA must not impose higher duties than what existed in the FTA members' territories prior to the formation of the FTA. Trade creation effects of FTAs, should in theory, outweigh the loss of trade by third countries. "Regionalization of trade factors heavily into sustainable economic growth",[29]which has been demonstrated by the European Union and NAFTA.

---

and+not+RW%2A%29&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FDS%2F34ABR%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FDS34%2FAB%2FR (Last visited Mar.22, 2009).

[23] See footnote 21 above at 28.

[24] BRAZIL-MEASURES AFFECTING IMPORTS OF RETREADED TYRES WT/DS332/AB/R, December 3, 2007, Paragraph 254 Appellate Body, see full text at: http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28%40meta%5FSymbol+WT%FCDS332%FCAB%FCR%2A+and+not+RW%2A%29&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FDS%2F332ABR%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FDS332%2FAB%2FR (Last visited Mar.22, 2009).

[25] Id. at Paragraph 256.

[26] Id. at Paragraph 258 (b) (ii).

[27] Jagdish Bhagwati, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (2008).

[28] Id. at 17.

[29] Chantal Thomas, Poverty Reduction, Trade, and Rights, 18 Am. U. Int'l L. Rev. 1399, 1410 (2002-2003).

Lawrence Summers is "in favor of all lateral reductions in trade barriers, whether they be multi, uni, bi, tri, plurilateral. Global liberalization may be best, but regional liberalization is very likely to be good."[30] He regards the debate about trade diversion proclivity of FTAs as inconsequential and "find it surprising that this issue is taken seriously-in most other situations, economists laugh off second best considerations and focus on direct impacts." [31] This position drew a sharp reaction from Bhagwati and Panagariya who responded that:

> We may recall that, since Viner's (1950) classic work, PTAs have been considered to be harmful both to member countries whose imports are the subject of the trade diversion and to the world under trade diversion and welfare-enhancing under trade creation. This ambiguity of outcomes, depending on the relative strengths of the two effects when a PTA is formed, has been the principal reason for the debate among economists as to whether a specific PTA is desirable."[32]

Robert Pahre a realist asserts that, "regionalism takes away an important motive for global negotiations such as a proposed new round of the WTO." [33] Hudec and Southwick made a valid conclusion in 1999 which is still valid today: "The jury is still out on whether the proliferation of RTAs advances trade liberalization or allows for an increasingly tangled web of trade-distorting preferential regimes."[34]

II. Framework of GATT and FTAs

A. The Most Favored Nation Clause

[30] Larry H. Summers, Regionalism and the World Trading System in , The WTO and Reciprocal Preferential Trading Agreements,420,421(Caroline Freund ed., 2007).

[31] Id. at 425.

[32] J. Bhagwati and A. Panagariya, Preferential Trading Areas and Multilateralism: Strangers, Friends or Foes?, in The WTO and Reciprocal Preferential Trading Agreements,93,100(Caroline Freund, ed., 2007).

[33] Robert Padre, Most-Favored-Nation Clauses and Clustered Negotiation, in The Rational Design of International Institutions, 129(Barbara Koremenos, Charles Lipson and Duncan Snidal, eds., 2004).

[34] Robert E. Hudec and James D. Southwick, Regionalism and WTO Rules: Problems in the Fine Art of Discriminating Fairly in Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations, 47,79(Miguel Rodriguez Mendoza, Patrick Low and Barbara Kotschwar, eds., 1999).

The most favored nation (MFN) clause developed during the seventeenth century[35] as a common practice of nations to insert in their trade treaties a commercial provision[36] having the effect of present day MFN clauses. A conditional MFN was introduced by the American treaty with France on February 6, 1778 which set the United States apart from other nations until 1923 when it adopted unconditional MFN.[37] "Simply put, the MFN principle required that every trade advantage given to any country (GATT member or not) must be given, immediately and unconditionally, to every other GATT member."[38] The conditional MFN came back during the Tokyo Round in 1979 in the form of the Government Procurement Code, and the Subsidies Code in favor of developing countries which was strongly resisted by the United States.[39]

The conditional MFN issue remained dormant for the rest of the 1980s. As the Uruguay Round moved toward its conclusion, however, some developed country governments once again began to speak about "free riders." By the time of the Dunkel text" in December 1991, the issue had produced a radical demand that all GATT members sign all GATT texts, or else leave GATT altogether.[40]

Marrakesh Morocco was the place where the Uruguay Round was concluded on April 15, 1994 which led to the emergence of the World Trade Organization on January 1, 1995.[41]

B. The Codification of Free Trade Areas under GATT 1947

The key exceptions to the MFN clause were retention of colonial preferences, formation of customs union and free trade areas.[42] The genesis of the free trade area exception can be

[35] Jacob Viner, Studies in the Theory of International Trade 63 (1965).
[36] See Viner, supra note 16, at 101.
[37] Id. 101-102
[38] Robert E. Hudec, Enforcing International Trade Law: The Evolution of the Modern GATT Legal System 6 (1993).
[39] Id. at 121-122.
[40] Id. at 123.
[41] See Lowenfeld, supra note 14 at 73.
[42] See Hudec, supra note 38 at 6.

traced to the following extract from a secret agreement between Canada and the United States of America.[43]

> …deviation from the orthodox customs union…would not conform to that part of the definition of a customs union in Art. 42, par. 4 of the Charter and Art. XXIV, par. 4 of GATT which specifies that substantially the same tariffs and other regulations of commerce must be applied by each of the members to the trade of third countries.[44]

The US employed subterfuge to support French amendments for Lebanese and Syrian demands for a modified custom union to introduce FTA exception.[45] Article XXIV(8) (a) of GATT provides that a customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce (except where necessary, those permitted under Articles XI-XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least substantially all the trade in products originating from the territories.(ii) A common tariff must be applied by all constituent parts of the custom union to external trade.

Article XXIV (8) (b) of GATT provides that a free -trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI,[46] XII,[47] XIII,[48] XIV[49], XV[50] and XX[51]) are eliminated on substantially all the trade between the constituent territories in products originating in such territories. Free Trade Areas (FTAs) are

[43] Kerry Chase, Multilateralism Compromised: the mysterious origins of GATT Article XXIV, 5 World Trade Review 1, 1-30(2006).
[44] Id. at 14.
[45] Id. at 14-15.
[46] General elimination of quantitative restrictions.
[47] Restrictions to safeguard balance of payment
[48] Non-discriminatory administration of quantitative restrictions.
[49] Exceptions to the rule of non-discrimination.
[50] Foreign exchange arrangements with the International Monetary Fund.
[51] General exceptions.

relatively easier to establish, and with the failures of the Doha rounds of the WTO from 2001 to 2008, over 400 FTAs are projected to be active by 2010.

C. Domination of World Trade by the United States and the European Union

According to the constructive school of international relations the domineering influence of the United States within the world global trading system has been attained by subtle projection of American values on the world community. This has been to create a world trading system in synchronization with the prevalent ideals of American trading interests. According to Ethan Kapstein:

> Just as individuals seek insurance or risk sharing mechanisms to tide them over when a crisis strikes, so states seek such devices in the form of military alliances, customs unions, and trade agreements and making it costly to escape from them, the insurance and or risk-sharing qualities are greatly enhanced.[52]

The United States has utilized the mantras of fairness and justice to shield its trade interests and it becomes problematic when the United States has emerged as the sole super power and the largest economy in the world with a greater temptation to act unilaterally.[53]

Gregory Shaffer in his construct succinctly appraised the overwhelming negative influence exerted by the European Union and the United States on developing countries in trade relations. According to him:

> The United States and EU are able to combine market power and their ability to forum-shift with vast material and informational resources that they deploy to their advantage in the drafting and application of WTO rules…As a result, the United States and EU have fashioned rules whereby they continue to protect and subsidize their domestic producers in the agricultural and textile sectors, while developing countries agreed to more costly commitments…The United States still applies an average tariff rate of 14 percent to goods from Bangladesh (primarily textile products), but only 1 percent to imports from France. In contrast, developing country

[52] Ethan B. Kapstein, Power, fairness and the global, in Power in Global Governance 98 (Michael Barnett and Raymond Duvall eds., 2005).
[53] Id. at 100-101. (national 100 security 101).

implementation of the TRIPS Agreement is estimated to result in wealth transfers from developing countries to the United States of around $5.8 billion per year. [54]

According to Peter Rosendorff and Helen Milner of the realist school of international relations:

The first instance of an antidumping law was Canada's 1904 dumping regime. In 1947 the United States instituted the world's safeguard clause…In the realm of safeguard clauses, for example, it is the United States that has the oldest laws and has been the most vocal proponent of them in international trade negotiations. U.S. trade law puts the escape clause into practice through Section 201 of the Trade Act of 1974…This practice has been followed closely in GATT largely at the United States' insistence. Article XIX of GATT permits a member to escape from its obligations not to raise trade barriers when one of its industries is suffering an economic downturn and is experiencing "serious injury." In the realm of antidumping and countervailing duties the same association is apparent. U.S. and Canadian laws have preceded international ones and set the pattern for them. Article VI of GATT, and the Second Antidumping Code of the Tokyo Round, which define practice in antidumping and countervailing duty law, allows member states to apply duties when imports are sold at "less than fair value," following U.S. practice.[55]

D. United States Subsidies and West African Cotton

Cotton farming is the lifeline of ten million West Africans and comprises a sizeable chunk of export revenues of the non petroleum exporting countries in the region.[56] It accounts for 90 percent of export revenues of Benin and the farming method and quality of ginnery ranks as the best in the world.[57] Burkina Faso is one of the poorest countries in world and 2 million of its citizens dependent on cotton were threatened with starvation by United States cotton subsidies.[58] A World Trade Organization panel ruled in September 2004 that annual cotton subsidies of $3.2billion and $1.6billion in export subsidies paid by the United States had

[54] Gregory Shaffer, Power, governance and the WTO, in Power in Global Governance 134 (Michael Barnett and Raymond Duvall eds., 2005).
[55] B. Peter Rosendorff and Helen V. Milner, The Optional Design of International Trade Institutions: Uncertainty and Escape, in The Rational Design of International Institutions, 83 (Barbara Koremenos, Charles Lipson and Duncan Snidal, eds., 2004).
[56] ICTSD, OXFAM and IDEAS Centre Dialogue, Geneva, Can Negotiations on Agriculture Deliver Pro-Development Reforms? The Case of West African Cotton (June 17, 2003).
[57] Id.
[58] CIA, The World fact Book https://www.cia.gov/library/publications/the-world-factbook/geos/uv.html (Last visited Mar. 22, 2009).

contravened WTO rules.[59] The ruling was confirmed by the Appellate Body of the WTO on March 3, 2005.[60] Brazil initiated the complaint in 2002, Benin and Chad both from West Africa, signed on as third parties. The chicken had come home to roost and United States' strong tradition of compliance with WTO decisions has resulted in a gradual scale back of subsidies to its cotton farmers.[61]

Do not forget either that the first agricultural waiver from GATT discipline was secured by the United States in 1955, effectively leading to the chaotic situation in agriculture today. The United States was also among the earliest countries to start restricting textile imports, initiating the descent down the road to the Multi-fibre Arrangement (MFA) that restricts and regulates exports of textiles and clothing from developing to developed countries.[62]

Millions of West Africans employed in their decimated textile industry, lost their jobs as a result of this factor.[63] In 2005 at the Doha negotiation rounds of the WTO IN Hong Kong, the West African nations of Burkina Faso, Chad, Benin and Mali on behalf of thirty African producers of cotton advocated for a reduction of the high agricultural tariffs in the west.[64]

In agriculture – a sector that was a late comer to rules of multilateral trade – and which lags some 50 odd years behind the industrial, much of the developing world has placed its aspirations. The various forms of subsidies that the rich world had given to its producers, have crowded out

---

[59] US Cotton Subsidies Declared Illegal by WTO, Again, Oxfam America, http://www.oxfamamerica.org/newsandpublications/press_releases/archive-2005/wto_cotton_ruling (Last Visited Mar.21, 2009).

[60] United States –Subsidies on Upland Cotton WT/DS267/AB/R see full text at: http://docsonline.wto.org/GEN_highLightParent.asp?qu=%40meta%5FSymbol+%28WT%FCDS267%FC%2A%29+and+%28AB%29+and+not+%28RW%2A%29+and+%28%28+%40Doc%5FDate+%3E%3D+2005%2F01%2F01+00%3A00%3A00+%29+and+%28+%40Doc%5FDate+%3C%3D+2005%2F12%2F31+23%3A59%3A59+%29%29&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FDS%2F267ABR%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FDS267%2FAB%2FR (Last visited Mar.2009)

[61] Elinor Lynn Heinisch, West Africa versus the United States on Cotton Subsidies: how, why and what next?, 44,no.2 Journal of Modern African Studies 251,253(2006).

[62] Jagdish N. Bhagwati, United States Trade Policy at the Crossroads, 12 no.4 The World Economy,339,462-463(1989).

[63] World Bank Development Report 1998, see full text at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/1998/11/17/000178830_98111703550058/Rendered/PDF/multi0page.pdf (Last visited Mar.20, 2009).

[64] Pascal Lamy, WTO Director General , Opening Address, Twelfth Session of the Steering Committee – Parliamentary Conference on the WTO June 22, 2006 http://www.wto.org/english/news_e/sppl_e/sppl30_e.htm (Last visited Mar.21,2009).

African and other farmers from international markets, putting the breaks (sic) on their agricultural trade…While the average tariff worldwide on industrial goods is only 5%, it is 60% on the agricultural. In launching the Doha Round, the developing world insisted that these imbalances be corrected, and has since been very active in the negotiations.[65]

Success at the Doha Rounds would eliminate the multibillion dollar farm subsidies in developed countries, which destroy investments of farmers and their livelihood in Africa.[66] "Developing countries now have lower tariffs for agricultural products than developed states and…are exposed to highly subsidized products entering their markets at price that undercut local producers."[67] The WTO Agreement on Agriculture came into force on January 1, 1995, and effectively retained a bound tariff of 60% on agriculture products for Europe and the United States.[68] The United States started providing huge subsidies for its farmers during the "Great Depression in the 1930s. In Europe they began in the aftermath of the Second World War and with the establishment of the European Community."[69] Fairer WTO rules regulating agriculture subsidies and tariffs would dramatically improve the competitiveness of African agriculture and eliminate the reliance on imported food.[70]A successful Doha Round will improve income level of farmers in the developing world.[71]

E. TRIPS

---

[65] Id.

[66] Jean-Pierre Chaffour, Global Food Crisis: Trade Policy Origins and Options, Trade Note 34, World Bank 7(July 24, 2008) http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1126812419270/Trade_Note_34_Jul_24_08.pdf (Last visited Mar.22, 2009).

[67]Penelope Simons, Binding the Hand that Feeds Them: The Agreement on Agriculture, Transnational Corporations and the Right to Adequate Food in Developing Countries, in Redefining Sovereignty in International Economic Law, 399, 410 (Wenshua Shan, Penelope Simons and Dalvinder Singh, eds., 2008).

[68] Agreement on Agriculture, see full text at: http://www.wto.org/english/docs_e/legal_e/14-ag.pdf (Last visited Mar. 21, 2009).

[69] G. Edward Schuh, Developing country interests in WTO, In The Political Economy of International Trade Law: Essays Honour of Robert E. Hudec,435,436(Daniel L.M. Kennedy and James D. Southwick eds., 2002).

[70] World Bank, Global Economic Prospects 2009: Commodities at the Crossroads,13, see full text at: http://siteresources.worldbank.org/INTGEP2009/Resources/10363_WebPDF-w47.pdf (Last visited Mar.22,2009).

[71] Id. at 97.

Developing countries which had focused on development for half a century, either failed to understand the implications of incorporating patent and copyright protection into WTO's binding obligations, or Article II (4) of the Agreement Establishing the World Trade Organization tied their hands.[72] Put simply they had a choice to be bound under GATT 1947 which dealt only with physical goods or sign up to GATT 1994 with its attached multilateral agreements on services, patents and copyrights as one package.[73] The United States had opted for GATT 1994 after the required six month notice, and most developing countries had to jump unto the same boat with the United States the largest trading economy in the world.[74] "The problem is that there is no ground for a presumption that the TRIPS agreement will increase world economic welfare…"[75] At a World Intellectual Property Organization meeting in 1987, Brazil, Cuba, France and India opposed the suggestion by the United States of including counterfeiting measures within GATT and felt such measures should be left to WIPO mechanism. The position of the intelligentsia in the United States during this era can be summed up as follows:

> Inclusion of an anti-counterfeiting code in the GATT would send a signal to infringing countries that the United States intends to take concrete action to help the motion picture and similar situated industries. It would also be a comparatively easy place for the United States to begin implementing a protective program because the GATT- and any code promulgated under it- deals with tangible goods, rather than more intangible efforts such as opening markets abroad and halting piracy.[76]

It was the private lobby led by heads of Pfizer, IBM and the Motion Picture Association of America that prevailed on the Reagan administration and effectively won the heart and mind

---

[72]Brian Hindley, What Subjects are suitable for WTO agreements? In The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec, 157,158(Daniel L. M. Kennedy and James D. Southwick eds., 2002).
[73] Id. at 158.
[74] Id.
[75] Id. at 168.
[76] Jan D'Alessandro, A Trade-Based Response to Intellectual Property Piracy: A Comprehensive Plan to Aid the Motion Picture Industry, 76G.L.J.460 (1987-1988).

of the United States Trade Representative (USTR)[77] to incorporate TRIPS into the WTO.[78] The USTR is a cabinet level official and "the President's principal trade advisor, negotiator and spokesperson on trade issues." [79] These constellations of private interests persuaded the United States to join the Berne Convention which it had been very reluctant to join.[80] The United States had to amend its law to join the Berne Convention in 1989, after a hundred years of the existence of the convention.[81]

The WTO structure hermetically locked out technological progress of developing countries through the Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS).[82] TRIPS came into force on January 1, 1996, but on January 1, 2006 in Least Developed Countries (LDCs).[83] It is compulsory for any country that wants to join the WTO to also sign up to TRIPS. "Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members."[84] There is The Doha Ministerial Declaration of 2001 which permit countries to utilize compulsory licensing to produce generics of expensive patented drugs, to guarantee the health of their citizens.[85] East Asian phenomenal development process imported technical knowhow[86]when intellectual properties rights had not

---

[77] Susan Sell, Private Power, Public Law: The Globalization of Intellectual Property Rights, 75-95(2003).
[78] Id. at 96-120.
[79] Senate Approves USTR Designee Ron Kirk, Mar. 18, 2009, http://www.ustr.gov/assets/Document_Library/Press_Releases/2009/March/asset_upload_file828_15429.pdf (Last visited Mar. 22, 2009).
[80] Kevin Garnett, Gillian Davies and Gwilym Harbottle, Copinger and Skone James on Copyright, 1164, (2005).
[81] Robert P. Merges, Peter S. Menell and Mark Lemley, Intellectual Property in the New Technological Age, 387(2007).
[82] See the full text of the Agreement at: http://www.wto.org/english/docs_e/legal_e/27-trips.pdf (Last visited Mar.21, 2009).
[83] Id.
[84] Id. art. 72.
[85] Declaration on the TRIPS Agreement and Public Health Adopted on November 14, 2001, http://www.wto.org/english/theWTO_e/minist_e/min01_e/mindecl_trips_e.pdf (Last visited Mar.21, 2009).
[86] World Bank Development Report 1998, 32, see full text at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/1998/11/17/000178830_98111703550058/Rendered/PDF/multi0page.pdf (Last visited Mar.20, 2009).

been locked up by TRIPS[87]

Evidence exist of "misguided protection in the transfer of textile technology to certain African countries."[88] The Chinese, Indians and Koreans émigrés workers and researchers in western technology firms, bridged such hurdles through the appeal and support of their countries to repatriate crosscutting technologies home as either as investors or as representatives of foreign investors.[89] Former British colonies in West Africa like Ghana, Nigeria[90] and Sierra Leone have always had robust laws securing trademarks, copyright and patents[91] and have failed to attract the high levels of foreign direct investments of East Asia where similar laws were lacking until TRIPS came into effect in 1996.[92] Srinivasan has established that, developing countries by agreeing to TRIPS, have incurred huge costs and the concessions promised by developed countries have not been met.[93] "Reciprocal concessions proposed by the United States included a commitment to pursue reductions in EC agricultural subsidies, and a commitment to pursue reductions in textile quotas and to alleviate restrictions on the importation of tropical products."[94] These American carrots were coupled with the big stick of Section 301 actions and a threat to "abandon the GATT altogether, if its negotiating agenda was not accepted."[95]

1. Special and Differential Treatment (S&D)

---

[87] Id. at 33.
[88] Id. at 31.
[89] Id.
[90] Egerton Uvieghara, Copyright Protection in Nigeria- New Trends and Prospects, in Nigeria's Foreign Investment Laws and Intellectual Property Rights, 158-162(Bankole Sodipo and Bunmi Fagbemi eds., 1994); Bankole Sodipo, Piracy and Counterfeiting: GATTS, TRIPS and Developing Countries, 68-69(1997).
[91] Keith E. Maskus, Intellectual Property Rights in the Global Economy, 102-103 (2000)
[92] Id. at 199; see also Ikeochi Mgbeoji, TRIPS and TRIPS-Plus Impacts In Africa, in Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era, 259,278(Daniel J. Gervais ed.,2007).
[93] T.N. Srinivasan, The Trips Agreement, in The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec, 343-347(Daniel L.M. Kennedy and James D. Southwick eds., 2002).
[94] Frederick M. Abbott, The TRIPS-legality of measures taken to address public health crisis: Responding to USTR-State-industry positions that undermine the WTO, in the Political Economy of International Trade: Essays in Honor of Robert E. Hudec, 311,314(Daniel L.M. Kennedy and James D. Southwick eds., 2002).
[95] Id.

The developing countries which became independent in the 1950s pressurized GATT during its review session of 1954 to 1955 to redraft Article XVIII to protect their fledging infant domestic industries to enable competition on fair terms with industrialized countries.[96] The cascade of newly independent states in the early 1960s led to the formation of the developing countries dominated United Nations Conference on Trade and Development (UNCTAD)in 1964 as a rival to GATT; which influenced GATT to add a new Part IV entitled 'Trade and Development.[97] The Committee on Trade and Development (CTD) was set up by members of GATT to administer Part IV; and from 1966 to 1971, CTD granted waivers for Australia's tariff preferences to developing countries for certain products, the developed countries' General System of Preferences (GSP) schemes in favor of developing countries, and lastly the waiver for the Protocol for Trade Negotiations among sixteen developing countries.[98]

To have a secure legal basis for the granting of preferences to and among developing countries, the CONTRACTING PARTIES adopted the 'Enabling Clause' during the Tokyo Round of Trade Negotiations. The clause is important as it placed the concept of S & D treatment at the heart of the GATT legal system.[99]

On June 15, 1999 the WTO granted least developed countries (LDCs) a waiver from Article I paragraph I of GATT up till June 30, 2009 to enjoy preferential treatment.[100]

2. African, Caribbean and Pacific (ACP) and European Union (EU)

France and Belgium in 1957 joined the European Community (EC) on the condition that their former colonies should be coupled with the EC.[101] This led to the drafting of Lome I in 1975, out of the Rome Treaty and the 1963 Yaoundé Convention between the European Union

[96] Edwini Kessie, The Legal Status of Special and Differential Treatment, in WTO Law and Developing Countries 17(George A. Bermann and Petros C. Mavroidis, eds., 2007).
[97] Id. at 18.
[98]Id. at 18.
[99] Id. at 18.
[100] WTO Preferential Tariff Treatment for Least-Developed Countries, see full text at: http://www.wto.org/english/docs_e/legal_e/waiver1999_e.pdf (Last visited Mar. 22, 2009).
[101] Carl B. Greenidge, Return to Colonialism? The New Orientation of European Development Assistance, in New Perspectives on European Union Development Cooperation 103(Marjorie Lister, ed., 1999).

and its former colonies in Africa, the Caribbean and the Pacific (ACP).[102] The EU-ACP arrangement offered S&D treatment and was followed by Lome II in 1979, Lome III in 1984 and Lome IV in 1989. From 1970 to 1993 ACP exports to Europe fell from 8.9 per cent to 3.1 per cent and the ACP economies "have undergone precipitous declines."[103] The position of the EU on FTAs during the Uruguay Rounds in its Trade Policy Review of 1991 was:

> The Community's basic attitude in favor of the multilateral trade system has, of course since the inception of the GATT, existed hand-in-hand with its enthusiastic support for and active involvement in free trade arrangements of a regional character…For the Community there is indeed no contradiction between these two positions. We have always believed that regional trade arrangements complement the multilateral system and represent an intermediate step towards the ideal of trade that is free of all customs duties and import restrictions among all nations. Progress on a more limited, regional basis among countries with homogenous economies and with close links in the geographical sense, may be the best achievable in the medium term.[104]

Trade between the first twelve members of the EU from 1958 to 1990 increased from 35 per cent to 59 per cent while trade with most other countries fell and "the steepest decline was that of ACP countries.[105] EU's technical assistance to increase West African beef production was undermined by EU beef exports to West Africa, while sugar refineries in ACP countries financed by the EU got decimated by EU sugar exports.[106] The EU-ACP in response to WTO rules[107] and the "Bananas Wars"[108] which divided Europe[109] came up with the Cotonou Agreement of 2000

---

[102] Id. at 103-104.
[103] Id. at 106.
[104] Reproduced in Martin Wolf, The Resistible Approach of Fortress Europe 23 (1994).
[105] Id. at 26.
[106] Kunibert Raffer, Lome or Not Lome: The Future of European-ACP Cooperation, in New Perspectives on European Union Development Cooperation 135 (Marjorie Lister ed., 1999).
[107] The Enabling Clause under WTO does not permit preferential regional trade arrangements between developed and developing countries, developed countries must extend the same treatment to all developing countries, except least developed countries which must also be treated alike. Developed countries dispense preferential treatment to developing countries if they so wish to do. See also Jeanne J. Grimmett, Trade Preferences for Developing Countries and the WTO: CRS Report for Congress (2007) http://www.au.af.mil/au/awc/awcgate/crs/rs22183.pdf (Last visited Feb. 20, 2009).
[108] Raj Bhala, International Trade Law: Interdisciplinary Theory and Practice 1297(2008).
[109] Germany in particular had no ties with ACP countries exporting banana to Europe and preferred cheaper bananas produced by Chiquita the American multinational firms with huge operations in non ACP States in Latin

with twenty year life span.[110] The Agreement is subject to review every five years and was signed at Luxembourg on June 25, 2005.[111] The EU has slightly modified its multilayered and complex relationships with developing countries carved up into different geo-political regions. Six EU Partnership Agreements (EPAs) have been concluded and four EPAs were to have come into effect in four African economic regions on January 1, 2008.[112] Central Africa, East Africa, Southern African Development Community and ECOWAS comprise the four regions which till date have made little progress with the EPA arrangement.[113] The focus of this paper, ECOWAS,[114]has had its EPA stalled due to the refusal of Nigeria to sign up because Europe did not provide access to its market.[115] This raises the question once again whether the objectives of the EPA were well thought out.

The objective of economic and trade cooperation is to promote the integration of the ACP countries into the global economy, by enhancing production and the capacity to attract investment, and ensuring conformity with WTO provisions, whilst taking account of respective developmental constraints…The ACP-EC Agreement aims to support the mutually reinforcing effects of economic and trade cooperation and development aid.[116]

America. See Scott Barfield, Multilateral Agreement on an EU Banana Trade Regime-Political Compromise http://www.acp-eu-trade.org/library/files/Barfield_EN_072002_multilateral-agreement-on-an-EU-banana-trade-regime.pdf (Last visited Feb.20, 2009); For a Constitutional Court Ruling in Germany on the Banana dispute see Miriam Aziz, Sovereignty Lost, Sovereignty Regained? The European Integration Project and the Bundesverfassungsgericht http://www.iue.it/RSCAS/WP-Texts/01_31.pdf (last visited Feb. 21, 2009).

[110] Nsongurua J. Udombana, Back to Basics: The ACP-EU Cotonou Trade Agreement and Challenges for the African Union, 40 TEX. INT'l. L.J.59, 59-111 (2004).

[111] ACP-EU Joint Parliamentary Assembly, ACP-EU/100.203/08/fin. http://www.europarl.europa.eu/intcoop/acp/60_15/pdf/re_integration_en.pdf (Last visited Feb. 21, 2009).

[112] African Union, Economic Partnership Agreements, http://www.africa-union.org/root/AU/AUC/Departments/TI/EPA/epa.htm (Last visited Feb.21, 2009).

[113] Lionel Fontagne, Cristina Mitaritonna and David Laborde, An Impact Study of the EU-ACP Economic Partnership Agreements (EPAs) in the Six ACP Regions 16 (2008) http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc_138081.pdf (Last visited Feb.22, 2009).

[114]Olumuyiwa B. Alaba, EU-ECOWAS EPA: Regional Integration, Trade Facilitation and Development in West Africa, https://www.gtap.agecon.purdue.edu/resources/download/2599.pdf (Last visited Feb.22, 2009).

[115] Why Nigeria Refused to Sign EPA-ECOWAS, http://www.bilaterals.org/article.php3?id_article=12628 (Last visited Feb. 22, 2009).

[116] Partnership Agreement ACP-EC, http://ec.europa.eu/development/icenter/repository/Cotonou_EN_2006_en.pdf (Last visited Feb.24, 2009).

Maybe the emphasis should have been on the elimination of numerous subsidies in Europe which debar imports from West Africa to enable real development to occur.[117]

III. Economic Community of West African States (ECOWAS)

This section traces the formation of ECOWAS and its evolution between 1975 and 2009. The goals of ECOWAS are appraised against the backdrop of economic difficulties, diverse legal systems, wars and political instability in West Africa. An evaluation of the ECOWAS Treaty is carried out together with the additional protocols which were formulated to cope with subsequent challenging circumstances in West Africa. This process helps in arriving at a performance scorecard.

A. The Formation of ECOWAS

The first annual report of the Economic Commission for Africa (ECA) expressed concern about the "economic groupings in Europe on African economies" and mandated its Executive Secretary to:

> …study and appraise the effects of economic groupings in Europe on industrialization in Africa, intra-African trade and Africa's economic development in general, and to recommend measures necessary to offset any prejudicial effects of such economic groupings…" [118]

In response to regional groupings in Europe, the ECA commissioned sub regional studies throughout Africa and concluded that Africa's development would be enhanced by sub-regional groupings.[119] "The emphasis on regional groupings, however, did not mean that the various sub-regions were to be self-contained units. The goal should be an African common market

[117] Department for International Development, Economic Partnership Agreements: Making EPAs Deliver for Development, http://www.dfid.gov.uk/aboutdfid/organisation/ukpolicy-epas.pdf (Last visited Feb. 22, 2009).
[118] Economic Commission for Africa Annual Report 17(1960)
[119] Economic Commission for Africa Annual Report 10-1 (1962).

embracing all countries of the continent."[120]

Concrete steps to form ECOWAS commenced at a Conference on Economic Cooperation in West Africa, held by eleven West African States in Niamey, Niger Republic in October 1966.[121] This was followed by another conference held in Ghana in 1967 which adopted Articles of Association[122] presented by the ECA executive secretary, Robert Gardiner. He noted that "branches of economic activities are closed to majority of West African countries due to their small economic size."[123] Fifteen West African states concluded the ECOWAS treaty from 27 to 28 May 1975 in Lagos, Nigeria and at Lome, Togo in November 1976; five protocols to the ECOWAS treaty were signed.[124] ECOWAS has fifteen members made up of Benin, Burkina Faso, Cape Verde, Cote D'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.[125] These are former British, French and Portuguese colonies with disparate legal systems modeled on civil law and the common law greatly modified by autochthonous circumstances.

1. Objectives of ECOWAS

ECOWAS treaty of May 28, 1978 was revised at Cotonou on July 24 1993.[126]The aims of ECOWAS are to promote co-operation and integration leading to the establishment of a customs union in West Africa in order to raise the living standards of its peoples and to maintain enhanced economic stability, foster relations among its members while contributing to the

[120] Economic Commission for Africa Annual Report 25(1964).
[121] S.K.B. Asante, The Political Economy of Regionalism in Africa: A Decade of the Economic Community of West African States 50 (1986).
[122] Formulated at the October 1966 Niamey Conference.
[123] See Asante; supra note 119, at 51.
[124] Id. at 57.
[125] ECOWAS Member States, http://www.ecowas.int/ (Last visited Feb. 22, 2009).
[126] See ECOWAS Treaty, July 24, 1993, available at http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en (Last visited Feb.22, 2009).

progress and development of West Africa. [127] To achieve these objectives ECOWAS has sought the harmonization and co-ordination of national policies through integration programmes in agriculture, industry, transport, communications, energy, trade, finance, taxation, law reform.[128]It attempts to harmonize and coordinate regional policies to protect the environment.[129] The attempt to set up joint venture production enterprises has not been attained.[130] ECOWAS has sought to liberalize trade among its members through the abolition of import and export duties as well as the elimination of non-tariff barriers in West Africa.[131] Very strict rules of origin have eliminated a large number of industries from intraregional trade.[132] Nigeria accounts for 75 percent of ECOWAS exports and 45 percent of its imports and if Nigeria is excluded intraregional trade rises to 20 percent.[133] Burkina Faso, Niger and Mali which are landlocked have a higher level of intraregional trade.[134] Bhagwati asserts that rules of origin make a mess of international division of labor in a global age.[135] Goods produced in free trade zones or export processing zones shall in no case be considered as goods emanating from ECOWAS members.[136] The goal of a common external tariff and a common trade policy vis-à-vis third countries[137] has not been realised. Free movement of persons, goods,

---

[127] Id. art. 3(1).
[128] Id. art 3(2)(a).
[129] Id. art. 3(2) (b).
[130] Id. art. 3(2)(c).
[131] Id. art. 3(2)(d)(i).
[132]Trade and Development Report 2007 , United Nations Conference on Trade and Development , 100 full text available at: http://www.unctad.org/en/docs/tdr2007_en.pdf (Last visited Mar.21,2009).
[133] Id.
[134] Id.
[135] The Global Age: From a Skeptical South to a Fearful North, 7th Raul Prebisch Lecture, April 1996, United Nations Conference on International Trade and Development, 28 full text available at http://www.unctad.org/en/docs/prebisch7th_bhagwati_en.pdf (Last visited Mar.21, 2009).
[136] Protocol Relating to the Definition of the Concept of Products Originating From Member States of the Economic Community of West African States, May 2002, available at http://www.comm.ecowas.int/sec/en/protocoles/Protocol_relating_to_the_definition_of_products050402.pdf (Last visited Feb. 22, 2009).
[137] ECOWAS Treaty, supra note 126, art. 3(2)(d)(ii).

services, capital and right of residence have been realised by ECOWAS, [138]with the attainment of its phased implementation.[139]

2. Institutions of ECOWAS

The following institutions have been instrumental in the achievement of the objectives of ECOWAS; the Authority of Heads of State and Government,[140] Council of Ministers,[141] Community Parliament,[142] Economic and Social Council,[143] Court of Justice,[144] and the Executive Secretariat[145] now known as the Commission. ECOWAS also established the ECOWAS FUND for Cooperation, Compensation and Development (ECOWAS Fund) in its treaty[146] and the ECOWAS Fund became operational in 1979.[147]

In order to enhance the financial resources of the Fund through the opening to non-regional partners, the Authority of Heads of State and Government at its twenty-second session held on 9 and 10 December 1999 decided to transform ECOWAS Fund into a regional holding company called ECOWAS Bank for Investment and Development (EBID) with two specialized subsidiaries, ECOWAS Regional Development Fund (ERDF) and ECOWAS Regional Investment Bank (ERIB). The EBID Group became operational in 2003.[148]

ECOWAS Parliament came into existence in 2001 and the second legislature was inaugurated in November 2006 with 115 seats divided amongst its members based on population size.[149]

---

[138] See Protocol Relating to Free Movement of Persons, Residence and Establishment, May 29, 1979, available at http://www.comm.ecowas.int/sec/index.php?id=ap010579&lang=en (Last visited Feb. 22, 2009).
[139] See Supplementary Protocol on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movements of Persons, Right of Residence and Establishment, May 30, 1990, available at http://www.comm.ecowas.int/sec/index.php?id=asp020590&lang=en (Last visited Feb. 22, 2009).
[140] ECOWAS Treaty, supra note 126, arts. 7-9.
[141] Id. arts.10-12.
[142] Id. art. 13.
[143] Id. art. 14.
[144] Id. art. 15.
[145] Id. art. 17.
[146] Id. art. 21.
[147] See ECOWAS Bank for Investment and Development, http://www.bidc-ebid.org/en/bidc_en.php (Last visited Feb. 22, 2009).
[148] Id.
[149]See ECOWAS Parliament, http://www.parl.ecowas.int/ (Last visited Feb. 22, 2009).

Nigeria has the highest number of thirty-five seats while Cape Verde, Gambia and Togo have five seats each.[150]

B. Trade Creation and a Common Market

ECOWAS accounts for half of the total ACP exports into Europe which comprise mainly of raw agricultural products.[151] The abolition of tariff on European imports under the EU-ACP EPAs will lead to a 70 per cent loss of tariff revenues by ACP countries and West Africa will be the most affected region.[152] This might be compounded by the current global crisis rocking the European Union. "The asymmetric nature of international trade and financial relations is such that any change in performance in the industrialized countries is amplified in its effects on the developing economies."[153] ECOWAS needs to increase trade growth through greater integration which spurs investment.[154] The Economic Commission for Africa observed in 1996 that Integration presupposes development of transportation and communication linkages as well as "investment in human resources."[155] This was similar to its findings in 1961 in a study on transport problems in West Africa in relation to economic development which stressed:

> … the fact that hardly anywhere in Africa is there a fully integrated transport system permitting a rational mode of transport best suited to demand. Since existing transport systems were primarily developed to serve foreign trade, there is a marked lack of services catering for domestic markets.[156]

---

[150] Id.
[151] See Fontagne et al., supra note 113, at 4.
[152] Id. at 5.
[153] Giovanni Andrea Cornia, Economic Decline and Human Welfare in the First Half of the 1980s in Adjustment with a Human Face 16(Giovanni Andrea Cornia, Richard Jolly and Frances Stewart 1988).
[154]Barbara Stallings, Globalization and Liberalization: The Impact on Developing Countries 31(2001)
[155] United Nations Economic and Social Council, Serving Africa Better: Strategic Directions for the Economic Commission for Africa 40(1996)
[156] Economic Commission for Africa Annual Report, 9(1961).

1. Trade Barriers

ECOWAS comprises of a potpourri of Francophone, Anglophone and Lusophone legal systems modified by autochthonous circumstances of its fifteen members which has hindered intraregional trade. "As a matter of fact very little work has been done in the area of harmonization of law among African countries."[157] The Francophone: Economic Community of the States of Central Africa (CEEAC), Comite Permanent Consultatif du Maghreb (CPCM), Central African Common Market (UDEAC) and the Anglophone East African Common Market were adversely affected by lack of harmonization of the laws of the component members.[158] "Admittedly the effect of the Economic Community of West Africa (ECOWAS) has been exceptional for regional economic organizations."[159]

At a 1960 London conference of the British Commonwealth on the future of law in Africa, the challenge was how to synthesize numerous indigenous legal systems with various strands of the common law bequeathed by Britain on its former colonies.[160] "The harmonization of trade laws and commercial practices is an important ingredient of regional integration, without which meaningful economic integration cannot be achieved."[161] Other barriers to trade within the ECOWAS region consist of poorly maintained road networks and insufficient penetration of rural areas where most agricultural production takes place.[162] A border crossing in Africa is equivalent to the cost of 1000 miles of inland travel in Africa and 100 miles of travel in

[157] Gbenga Bamodu, Transnational Law, Unification and Harmonization of International Commercial Law in Africa, 38, no.2 Journal of African Law,125, 131(1994).
[158] M.L. Marasinghe, A Review of Regional Economic Integration in Africa with Particular Reference to Equatorial Africa, 33, no.1 ICLQ 39-56(1984).
[159] Id. at 55.
[160] The London Conference on the Future of Law in Africa, 4, no.1 Journal of African Law,1-3(1994).
[161] Muna Ndulo, Harmonization of Trade Laws in the African Economic Community,42No.1 I.C.L.Q.101,107(1993)
[162] Amadu Sesay, Olusola Ojo and Orobola Fasehun, The OAU After Twenty Years 63(1984)

Europe.[163]The economies of most states are small in size.[164] Ghana, Cote D'Ivoire and Nigeria are the few exceptions. Multiple currencies and varying exchange rates also hinder commerce within ECOWAS while telecommunications used to be a major problem until a few years ago.[165]The major problems remain transiting by road across West Africa through numerous road blocks manned by numerous uncoordinated agencies in each country. "There is no doubt… that the continuing use of roadblocks constitutes a serious hindrance to the development of Intraunion trade."[166]

International trade within West Africa is relatively little developed because countries of the region are not economically complementary in any marked degree; their structures of demand and production are not such that they can provide important markets and sources of supply for one another…But as yet exporting capacity even in manufactures, continues to be more readily absorbed overseas than in neighbouring countries.[167]

Trade in agricultural produce amongst ECOWAS citizens dating back centuries, prior to colonial rule has occurred across artificial colonial borders, oblivious of ECOWAS trade rules, "in disregard of law."[168] Citizens are obviously ahead of their leaders and bureaucrats in forging ahead with intraregional commerce. The period from 1973 to 1993 witnessed the same volume of intraregional trade within ECOWAS, showing that the formation of ECOWAS in 1975 did not create more trade during the first eighteen years of its existence.[169] Rice, corn, sorghum, millet, palm oil, groundnut oil, livestock and yams as well as petroleum formed the bulk of trade during

[163] World Bank, Global Economic Prospects 2005, 80 Box 4.2 (2005) see full text at: http://siteresources.worldbank.org/INTGEP2005/Resources/GEP107053_Ch04.pdf (Last visited Mar.22, 2009).
[164] Amadu Sesay, Obstacles to Intraunion Trade in the Mano River Union, in West African Regional Cooperation and Development 69-70 (Julius Emeka Okolo and Stephen Wright eds., 1990).
[165] Id. at 74-78.
[166] Id. at 79.
[167] Douglass Rimmer, The Economies of West Africa 16(1984).
[168] Id. at 153.
[169]Dean M. Hanink and J. Henry Owusu, Has ECOWAS Promoted Trade amongst its Members? 7 no.3 Journal of African Economies363, 380(1998).

this period.[170] Manufactured goods were marginal in volume and Europe supplied the bulk of imports of manufactured goods mimicking the colonial template which discouraged intraregional trade and local manufacturing. [171] External tariffs have fallen considerably in West Africa but volume intra regional trade has not surpassed the ten percent peak attained in 1980.[172]

C. Challenges Faced By ECOWAS

In the 1980s when African countries were in financial crisis, the World Bank and the International Monetary Fund administered a structural adjustment program that mandated African countries to eliminate public spending on health and education; to balance their budgets so as to qualify for loans to repay outstanding interest payments on loans sourced from western private banks. The same prescription was administered upon every African country with varying and different economic ailments. Elimination of public spending and scrapping of subsidies was the solution to reviving African economies. West African countries were directed to eliminate public spending on transport, roads, power and steel projects as well as communication, university education and research. The SAP therapies destroyed public infrastructure and led to massive decay of educational and health facilities[173] and electricity power projects collapsed and drove manufacturing enterprises from Africa to Europe and emerging economies of Asia. These therapies have assumed the umbrella term, "Washington Consensus".[174] "Many subsidiaries of French Banks went bankrupt in West Africa…forty-three of 139 British firms with industrial

[170] Id. at 367-368.
[171] Id. at 368-369.
[172] G.O. Odularu, Export diversification as a promotion strategy for intra-ECOWAS trade expansion, 3 no.2 African Journal of Business Management, 32, 34(2009).
[173] Howard Stein, Beyond the World Bank Agenda: An Institutional Approach to Development, 207-208(2008).
[174] John Williamson, What Should the World Bank Think about the Washington Consensus?, vol.15 no.2 The World Bank Research Observer, (August 2000) http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2000/11/10/000094946_00102705411757/Rendered/PDF/multi_page.pdf (Last visited Mar.20,2009), see also http://www.cid.harvard.edu/cidtrade/issues/washington.html (Last visited Mar. 20, 2009).

investments in Africa withdrew primarily from Nigeria, Zimbabwe and Kenya."[175]

There has been a palpable disconnect between ECOWAS and ordinary citizens as well as the organized business sector.[176] Ironically it was the efforts of ECOWAS in peace enforcement in Cote D'Ivoire, Liberia and Sierra Leone that brought it into public consciousness. Africa experienced in the past two decades the most horrific nature of human misery wrought by armed conflicts in Angola, Burundi, Democratic Republic of Congo, Eritrea, Ethiopia, Mozambique, Rwanda, Somalia, Uganda, and in West Africa, Cote D'Ivoire, Liberia and Sierra Leone.[177] Liberia lost 250,000 and Sierra Leone, 75, 000 of its most precious resource, human capital.[178] On August 7, 1990, ECOWAS established the ECOWAS Cease-Fire Monitoring Group (ECOMOG) to stop the Liberian civil war which started in 1989 and was destabilizing the West African sub-region.[179] The United Nations Security Council gave a retroactive approval to the actions of ECOMOG under Chapter VII provisions of the United Nations Charter.[180]

On August 30, 1997, in Abuja the Nigerian capital, the twentieth summit of ECOWAS deployed ECOMOG to stop the Sierra Leonean civil war and "restore the democratically elected government of Tejan Kabbah.[181] ECOWAS during this period was also trying to sustain its less than one per cent share of world trade and a very low level of intra-ECOWAS trade. [182] The above civil wars strained the limited financial resources of ECOWAS countries and the region is still recovering from the devastation wrought on the economies of battle theatres and their

---

[175] Jon Kraus, The Political Economy of African Foreign Policies: Marginality and Dependency, Realism and Choice, in Political Economy of Foreign Policy in ECOWAS, 245,249(Timothy M. Shaw and Julius Emeka Okolo eds., 1994).
[176] S.K.B. Asante, The Political Economy of Regionalism in Africa, 75(1986).
[177] Jeremy Levitt, Pro-democratic Intervention in Africa, in Africa: Mapping New Boundaries in International Law 103 (Jeremy Levitt ed., 2008).
[178] Id.
[179] Id. at 113.
[180] Konstatinos D.Magliveras and Gino J. Naldi, The African Union: A New Dawn for Africa? 51, no.2 ICLQ,415,419 footnote 28(2002)
[181] Id. at 117.
[182] Clement Emenike Adibe, ECOWAS in Comparative Perspective, in The Political Economy of Foreign Policy in ECOWAS 202 (Timothy M. Shaw and Julius Emeka Okolo eds., 1994)

neighbouring countries. Political instability is still a recurring decimal in West Africa and it has a very negative effect on the economies of ECOWAS. In January 2009, Guinea was suspended from ECOWAS pursuant to ECOWAS 2001 Protocol on Democracy and Good Governance after the army assumed power.[183] The assassination on March 2, 2009 of the President of Guinea Bissau brought this sad element to the fore again.[184]The Chairman of ECOWAS strongly condemned the murder and ECOWAS initiated efforts to entrench democracy in Guinea Bissau.[185] In March 2009, the ECOWAS President, Dr Chambas observed that:

> For more than thirty years, ECOWAS has led this regional approach to economic development …While some progress has been recorded, it is clear that not only does West Africa remain poor and undeveloped, but regional integration is not at the centre of the national development agenda; the potential of regionalism has not been properly explored and utilized. The development of the region requires much more attention and effort than has been forthcoming in the past.[186]

This shows a chasm between national aspirations and regional integration in West Africa.

Conclusion and Recommendations for Reform

The WTO believes that there would be 400 FTAs existing in 2010, and the debate has shifted from whether they are trade creating or distorting to how to utilise FTAs to reduce trade

---

[183] ECOWAS Leaders Reject Military Transition in Guinea, ECOWAS Press Release, January 10, 2009, http://news.ecowas.int/presseshow.php?nb=003&lang=en&annee=2009 (Last visited Mar.4, 2009).

[184] Guinea Bissau Asks Not To Be Abandoned, http://news.bbc.co.uk/2/hi/africa/7923264.stm (Last visited Mar.4, 2009); Guinea was earlier suspended from ECOWAS IN January 2009 after the military assumed power after the death of President Lansana Conte in December 23,2008 who had earlier assumed power in a 1984 military coup, see West African Bloc suspends Guinea, BBC, Jan.10, 2009, http://news.bbc.co.uk/2/hi/africa/7822167.stm (Last visited Mar.4, 2009). Mercenaries from South Africa have also been involved in coups in countries within West but not part of ECOWAS, see: Sao Tome coup condemned, BBC, July 17, 2003, where President Obasanjo of Nigeria intervened to restore the democratic government http://news.bbc.co.uk/2/hi/africa/3073631.stm (Last visited Mar 4, 2009); see also: Q&A: Equatorial Guinea Plot, BBC, where South Africans and a Briton were convicted in 2008 for mercenary activities against the government of Equatorial Guinea in 2004, http://news.bbc.co.uk/2/hi/africa/3597450.stm (Last visited Mar.4, 2009).

[185] ECOWAS Chairman condemns killing in Bissau, Urges Security Agencies to Avert Deterioration of Situation, ECOWAS Press Release, Mar.2, 2009, http://news.ecowas.int/presseshow.php?nb=020&lang=en&annee=2009 (Last visited Mar.4, 2009).

[186]Message from the ECOWAS President, Dr Mohammed Ibn Chambas, ECOWAS Vision 2020, http://www.ecowasvision2020.org/index.html (Last visited Mar. 27, 2009).

barriers within the WTO structure.[187] TRIPs is a global manifestation of how "the US constitutional imperative of the 'progress of Science and the useful Arts', intended to benefit the public, has been sabotaged by private capital with organized access to the legislative process." [188] This becomes relevant following the collapse of the Doha round of multilateral trade talks in July 2008 and the rise of FTAs deals.[189] The paper appraised the international economic law regime, through the establishment of ECOWAS in 1975 by fifteen contiguous states in West Africa, to promote inter-regional trade and remove all barriers to labor, capital and ultimately establish a single currency for its fifteen countries. An analysis was carried out on the implementation of the goals of ECOWAS, and the modification of its treaty through additional protocols; to guarantee, peace, security and democracy in West Africa as a sine qua non for engaging the global economic community in a symbiotic relationship. The paper concludes that ECOWAS has achieved peace and democracy in West Africa, despite limited resources, but its percentage share of world trade fell from 1.6 per cent in 1980 to 0.6 per cent in 2006, excluding oil exporting members. The paper observes that ECOWAS has a lot of homework to do in improving the quality of public infrastructure, access to credit by entrepreneurs, in order to promote regional trade and access to the global economy.

"Despite its numerous initiatives ECOWAS is still not an economic success."[190] It has evolved into an FTA as opposed to its ambitious goal of a customs union.[191] It needs committed and visionary leadership on the part of ECOWAS Heads of State to judiciously apply

---

[187] Mathew Schaefer, Ensuring That Regional Trade Agreements Complement The WTO System: US Unilateralism A Supplement To WTO Initiatives? 10 no.3 JIEL585, 586(2007).

[188] Ruth L. Okediji, The Limits of Development Strategies at the Intersection of Intellectual Property and Human Rights, in Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in TRIPS-Plus Era,355, 381(Daniel Gervais ed.,2007)

[189] Afta Doha: Should free traders applaud the rise of preferential trade deals?, 388 no.8596The Economist, 85-86(September 6, 2008)

[190] Kofi Oteng Kufour, The Institutional Transformation of Economic Community of West African States. 127(2006)

[191] International Economic Co-operation, 25, no.1 ICLQ 236-237 (1976).

state resources to improve transportation, energy supply and unknot the mercantilist rules of origin hindering intraregional commerce in manufactured goods. This will unleash the entrepreneurial spirit of citizens of West Africa who had traded for centuries, before the Berlin Conference[192] imposed boundaries upon time tested West African commerce. "One draws consolation from the fact that throughout Africa there is today a growing awareness of the need for meaningful economic integration at regional and sub-regional levels as the only way of solving the problems created by the division of the African continent into a number of economically non-viable States."[193]

ECOWAS Map courtesy African Union: http://www.africa-union.org/Recs/ECOWASProfile.pdf (Last visited Mar.23, 2009).

[192] The Berlin Conference: The General Act of Feb. 26, 1885, see the full text at: http://web.jjay.cuny.edu/~jobrien/reference/ob45.html (Last visited Mar.22, 2009).

[193] M.A. Ajomo, Regional Economic Organizations the African Experience, 25 no.1 ICLQ 58,101(1976).